Supreme Court, U.S.
FILED
941700 APR 13 1995
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARVINELL BROWN, PETITIONER

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARVINELL BROWN, PRO SE
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HOUSTON, TEXAS 77085
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QUESTIONS PRESENTED

1. Whether Brown, a tenured teacher placed indefinitely on medical leave for a perceived mental disability and denied property and liberty interest, is entitled to a hearing?

2. Can res judicata be used to settle an issue where there is reason to doubt the quality or fairness of procedures in prior litigation?

3. Can res judicata settle new law?

4. Whether the 5th Circuit panel used an abuse of discretion by deciding not to even rule on Brown's Petition for Rehearing En Banc. Brown criticized the 1992 three-man panel in Brown I. Should Weiner and Duhe had been reclused from the panel for Brown II? Did Weiner and Duhe have bad feelings toward Brown because of her statements about them?

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INTRODUCTORY PRAYER

Petitioner Brown prays to our heavenly Father that justice and righteous will prevail. Petitioner Brown also prays that the Honorable Supreme Court of the United States grant a writ of certiorari to determine whether the 5th Circuit's decision conflicts with Kremer. & the 14th Amendment. This is a question of exceptional importance.

OPINIONS BELOW

The unpublished written opinion for Brown II-1995 of the Court of Appeals 5th Circuit appears in Appendix A to this opinion; no hearing was permitted. The written opinion for Brown II of the District Court for the Sourthern District of Texas appears in Appendix B. The 5th Circuit flatly rejected Brown's Petition for Rehearing In Banc.

The unpublished written opinion for Brown I-1992 of the Court of Appeals 5th Circuit appears in Appendix C to this opinion; no hearing was permitted. The written opinion for Brown I of the District Court for the Southern District of Texas appears in Appendix D.

JURISDICTION

The judgment of the 5th Circuit Court of Appeals (same three-man panel that decided Brown I) was entered on January 13, 1995 affirming dismissal against Brown for the defendant, Houston Independent School District. The Fifth Circuit denied Brown's timely motion for extended time to file Petition for Rehearing En Banc postmarked January 25, 1995 and on February 2, 1995 the 5th Circuit denied Brown's motion to extend time. In response to the denial for extended time received on February 4, Brown filed Petition For Rehearing In Banc on Febuary 8, 1995 but

the 5th Circuit flatly refused and discarded Brown Suggestion For Rehearing En Banc on ??????. (Appendix B) The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

The 5th Circuit decision conflicts with other 5th circuit cases, other court of appeals' decisions, and with applicable decisions of this Supreme Court.

CONSTITUTIONAL & STATUTORY PROVISIONS

Appendix F contains Fourteenth Amendment to U. S. Constitution. Appendix G contains ADA 42 U.S.C.A. § 12112. Appendix H contains 29 U.S.C § 701 (Section 504 of the Rehabilitation Act of 1973); 29 U.S.C § 793 Sections 501 503. Appendix I contains TITLE VII 42 U.S.C.A. § 2000e et seq., 42 U.S.C.A. § 1983. Appendix J contains Texas Education Codes.

STATEMENT OF THE CASE- Brown I was filed in the Southern District of Texas-Houston Division on March 20, 1989 filed memorandum and order granting the defendant's motion for summary judgment on January 17, 1991. Unfortunately without a hearing, Judge Harmon granted the defendant final summary judgment on May 28, 1991. (Tr. p. 140). Brown filed notice of appeal on 6/8/91. The 5th Circuit panel consisting of the same Brown II panel mistakenly thought an hearing had been held before Brown was denied property interest and liberty interest. So the 5th Circuit panel consisting of Justice Jones, Justice Duhe, and Justice Wiener affirmed the district court's opinion on 2/25/92 and cert. denied, 113 S.Ct. 198 (Oct. 5, 1992) (Tr. p. 25).

Brown II started when Brown received her right-to-sue letter on May 25, 1993. Brown, Pro Se, filed Brown II on 8/5/93 (Docket No. #1). There were no hearings and no questions asked; the district ruled in favor of the defendants and issued a final judgment on April 18, 1994. (Docket #21) Brown filed a notice of appeal on May 3, 1994. (Docket #23) Brown filed her Appellate Brief-September 1994. The Hearing Panel consisting again of Justice Duhe, Justice Weiner, and Justice Stewart affirmed the district court's judgment in all respects on January 13, 1995. The Fifth Circuit denied Brown's timely motion for extended time to file Petition for Rehearing En Banc postmarked January 25, 1995 and on February 2, 1995 the 5th Circuit denied Brown's motion to extend time. In response to the denial for extended time received on February 4, Brown filed Petition For Rehearing In Banc on

Febuary 8, 1995 but the 5th Circuit flatly refused and discarded Brown Suggestion For Rehearing En Banc on ??????. Justice Stewart was the only new panel member.

STATEMENT OF FACTS-Houston Independent School District has refused to hold any hearings or to terminate Brown and have placed Brown as of January 19, 1989 on indefinite medical leave without due process for a perceived mental incapacity. (Tr. pgs. 38, 47). In Brown I, the 5th Circuit panel mistakenly ruled that HISD had given Brown a hearing. New evidence clearly shows that no hearing was even held. HISD superintendent and school attorney 'ruled' that a person placed on medical leave is not due an hearing. (Tr. pgs. 41, 55, 87) Oddly, the 5th Circuit panel is the only party claiming that a hearing had been held.

In debted to God's grace and mercy, Brown successfully rated very well on

proficiency tests given to her students and her evaluations were good. (Tr. pgs. 8, 18, 33) Under section 504 principles and ADA, once an employee is on the job, the person's ***actual*** performance is the best measure of that person's ability to do the job. The results of the medical examination cannot be used to discriminate against a person with a disability if the person is still qualified for the job. 42 U.S.C.A. §12112(c)(4)(A). The record shows that Brown was doing a satisfactory job. She received this satisfactory rating five days before she was referred. There is no evidence in the record that Brown was not doing her job adequately. Even if the defendants had shown that Brown was not doing her job adequately, ADA requires that HISD should had offered Brown reasonable accommodation for this perceived mental capacity.

During Brown's final year the situation continued to deteriorate when Anne McClellan told Brown that her teacher evaluation might be bad so documenting was necessary. But Brown's prior evaluation was 'clearly outstanding'. (Tr. p. 33) So McClellan's approach made Brown more defensive. Brown warned McClellan and Jones that she would call police if her evaluation was bad and that she had no other recourse. (Tr. p. 21). On November 23, 1988, after reviewing McClellan's evaluation, Brown called police to voice discriminatory practices. (Tr. p. 22). At the taped meeting, Brown stressed to police something needed to be done such as a transfer. She told police that she was being discriminated against and that she was being assigned the worse students. Just 5 days later on November 28, 1988, Principal Jones retaliated against Brown by giving a letter without hearing or reasons

indicating an immediate appointment with Dr. Mattye Glass to see if Brown was mentally fit to teach. Brown asked Jones to wait until she retained a lawyer but Jones refused her request. (Tr. p. 20).

After one meeting with the Appellant, Dr. Glass found it necessary that Brown see a psychiatrist. HISD had no reasonable basis for referring Brown to see a psychiatrist. The late reasons for questioning Brown's mental health showed evidence of retaliation and a violation of 1st Amendment rights. (Tr. p. 37). After rejecting Brown's first choice, HISD accepted Brown's 2nd choice of Dr. Estelle Robinson to evaluate her. But Robinson performed a negligent and incompetent diagnosis and then recommended that Brown be removed from the classroom; she only saw Brown on one occasion and she failed to perform a battery of tests. (Tr. p. 48). Dr. Robinson never observed Brown teaching

and HISD conveniently accepted her recommendation. This is clearly against section 504 and the ADA law. HISD removed Brown from the classroom without any type of hearing as required by the 14th amendment and refused to even consider any of Brown' grievances. In addition, HISD should not be using any doctors' examinations to decide Brown's employment eligibility-for Brown to remain on medical health leave. Currently, HISD is still basing there decision to keep Brown on medical leave because of Dr. Robinson's recommendation.

"A doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability. That responsibility lies with the employer. The doctor's role should be limited to advising the employer about an individual's functional abilities and limitations in relation to job functions, and about whether the individual meets the employer's health and safety requirements."(ADA EEOC, p. VI-9)

Brown went to another psychiatrist, Dr. John Wade, who observed her on more

than one occasion and performed a battery of tests. (Tr. pgs. 50, 51). Dr. Wade and 2 other experts recommended reinstatement. HISD arbitrarily and capriciously decided to reject Dr. Wade's recommendation and accepted the negligent and incomplete evaluation of Dr. Robinson. (Tr. p. 29). Refusing any hearing for a stigmatizing midyear dismissal, Jones labeled and branded Brown in front of teachers, administrators, and students by having a security guard watch and escort Brown off the campus as if she was dangerous and untrustworthy.

REASONS FOR GRANTING WRIT

In Brown I, the Fifth Circuit thought and ruled a due process hearing had been held before Brown was denied her property and liberty interest. But with new information obtained in 1993, one year after the death of Brown I, substantial new evidence indicated that there never was a

hearing held. New evidence obtained in 1993 shows that HISD, the defendant, has 'ruled' that a person placed on medical leave is not due a hearing. Brown, a tenured teacher, has indefinitely been placed on medical leave for over six years; HISD decided after the death of Brown I that "there is no entitlement to a hearing". (Tr. p. 55, 87)

.

1. Whether Brown, a tenured teacher placed indefinitely on medical leave for a perceived mental disability and denied property and liberty interest, is entitled to a hearing?

In 1992 for Brown I, the 5th Circuit erroneously thought a hearing was held. The 5th Circuit wrote "In short, she was given pretermination notice and hearing." (Appendix D,pg. 24a). But, both plaintiff and defendant have made it clear that there has been no hearing. HISD wrote that

a person placed on medical leave is not entitled to a hearing. AFTER THE DEATH OF BROWN I and in response to Brown's October 1992 request for a hearing, HISD school attorney, Elneita Hutchins-Taylor wrote (February 2, 1993) that

"There is no entitlement to a hearing" for Brown. (Tr. p. 55, 87)

Superintendent Petruzielo again stated

"It is important to emphasize that Ms. Brown was not suspended or terminated; rather, she was placed on medical health leave. This is significant because a proposal to suspend or terminate an employee triggers HISD internal due process procedures which afford the employee all the constitutional safeguards under the Due Process Clause of the United States Constitution; i.e., notice and a full evidentiary hearing. There is substantial legal support that an employee is only entitled to "some due process" before being placed on medical health leave." (Tr. p. 41,87)

After the death of Brown I in 1992, these new 1993 letters written by HISD's school attorney and the superintendent show that no hearing had been held before Brown, a tenured teacher, was denied her property

and liberty interests. This unfortunately shows that 5th Circuit had erred in thinking a hearing had been held. The Supreme Court has spoken through Kremer that "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Kremer v. Chemical Construction Corp., 456 US 481 (1981). This new evidence warrants trial, hearing and jury.

The Supreme Court has stressed that a tenured public school teacher could not be dismissed without notice of the precipitating charges and a pretermination administrative hearing at which the teacher was given the opportunity to challenge those charges. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972). Supreme Court cases mandate a plaintiff, who had a claim to continued employment, had a right to due process which required a hearing to

be held before suspension or deprivation of any significant property interest in his or her employment. Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780,786 (1971); Board of Regents v. Roth, 408 U.S. at 577 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982). The 14th Amendment requires opportunity for a hearing prior to Appellant being denied property interest. The 5th Circuit also stressed compliance with minimum due process procedures. This court wrote "Where the property interest is the employment of a tenured public school teacher the teacher must be provided timely notice and an opportunity to answer charges so as to minimize the likelihood of an erroneous discharge." Findeisen v. North East Independent School Dist., 749 F.2d 234 (5th Cir. 1984); Wells v. Dallas Independent School District 793 F.2d at 682 (5th Cir. 1986). A court has held that

placement of a teacher on a health leave for mental problems without a hearing did involve a deprivation of a property interest. Doe v. Anker, 451 F.Supp. 242 (S.D. N.Y. 1978).

Appellant was wrongfully and unlawfully denied her property interest and liberty interest in her employment with Appellee in January 1989 when HISD placed Brown on indefinite medical leave without an hearing. HISD ceased paying Brown and all benefits on January 18, 1989. Brown's property interest arises from her tenured teacher contract (Tr. p. 31) and property interest deprivation when HISD placed Brown on medical leave without due process. Deprivation of her property interest required due process procedures before the adverse action of arbitrarily placing Brown on medical leave. Perry v. Sindermann, 408 U.S. 593, 601-02 (1972); Board of Regents v. Roth, 408 U.S. 564, 577-78

(1972). The fourteenth amendment provides that no state shall deprive any person of life, liberty or property without due process of law.

The Fourteenth Amendment makes it clear "nor shall State deprive any person of life, liberty, or property, without due process of law." The Supreme Court wrote "When interests involving liberty and property rights protected by the Fourteenth Amendment are implicated, the right to some kind of prior hearing is paramount" Board of Regents v. Roth, 408 U.S. 564, 33 L Ed 2d 548(1972) and "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest in his employment." Boddie v. Connecticut, 401 U.S. 371, 379; 91 S.Ct. 780, 786.

Surely, after six years of deprivation of property and liberty interests, full due process procedures, not minimum or some due

process should had been given to Brown. HISD cannot show where Brown had an opportunity to present her side to her 'mental illness' accuser Principal Dr. Don Jones. Neither Dr. Glass or Dr. Estella Robinson were Brown's accusers, neither observed Brown in the classroom. Again, HISD cannot show where Brown presented her side to her accuser of mental illness. For example, Dr. Jones was in error when he claimed Brown was continuously pressing the panic button. Brown and students proved that Brown was not continuously pressing panic button. See (Tr. p. 10). If Brown had been given the American opportunity to explain to Jones that he was mistaken, maybe Brown would still be in HISD's classroom. The record does not show where Brown displayed any 'mental illness' a label of mental illness was placed on her by HISD; there is not a shred of evidence.

Neither the district court or 5th Circuit addressed this hearing issue in their decisions or even used the word 'hearing' (Appendix A & B).

2. Can res judicata be used to settle an issue where there is reason to doubt the quality or fairness of procedures in prior litigation?

The 5th Circuit made a mistake in ruling there was a hearing in Brown I. Brown II proved that there never was a hearing, so new evidence in Brown II makes 'res judicata' a wicked instrument of denying an American citizen and a child of God what is valued in our culture-a hearing. Hearing and due process are avenues in which justice can be wrought. Without an hearing, who can say or judge what is right. No hearing equates to no justice and to no truth. Hearings are

beloved American avenues to arriving at the truth.

In Brown I, appellant was alleging discrimination because of race and retaliation, but in Brown II, appellant is alleging discrimination because of a perceived disability. Brown II is inappropriate for res judicata because the parties are not identical in Brown I and Brown II and there are different causes of action in both Brown I and Brown II. Miller v. U.S. Postal Serv., 825 F.2d 62, 63 (5th Cir. 1987); Nilsen v. City of Moss Point, Mississippi, 701 F.2d 556, 559 (5th Cir. 1983). In Brown I, 5th Circuit decided Brown had been given an hearing. But in Brown II, new evidence shows Brown had not been given an hearing.

The Supreme Court has spoken through Kremer that "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of

procedures followed in prior litigation." Kremer v. Chemical Construction Corp., 456 US 481 (1981).

3. Can res judicata settle new law?

The district court mistakenly decided that there were the same causes of action and final judgment on the merits in both Brown I (7/18/90) and Brown II (8/4/93). This is impossible; ADA did not become effective until July 1992. Brown II has ADA and section 504 Rehabilitation Act of 1973 discriminatory allegations; these allegations were not in Brown I. Brown was denied trial de novo with both Brown I and Brown II; there has been no hearing or trial on the merits in any court. Brown I and Brown II have different defendants. Was this error for the district court to dismiss Brown's complaint based on res judicata?

The 5th Circuit wrote "As to the causes of action, whether Brown advances

different legal theories this time around is of no moment. The question is whether she could have advanced these legal theories in her prior lawsuit. . . Brown could have consolidated all her legal theories in her prior lawsuit." This is error; ADA did not become effective until July 26, 1992 after the death of Brown I.

4. Whether the 5th Circuit panel used an abuse of discretion by deciding not to even rule on Brown's Petition for Rehearing En Banc. Brown criticized the 1992 three-man panel in Brown I. Should Weiner and Duhe had been reclused from the panel for Brown II? Did Weiner and Duhe have bad feelings toward Brown because of her statements about them?

Brown had made a motion that Weiner and Duhe be reclused from taking part in any decisions regarding Brown II because in the last 2 years Brown has claimed and accused

Weiner and Duhe of be biased and prejudice. Brown wanted to make sure that the same panel that decided Brown I would not decide Brown II. Ironically, Weiner and Duhe were again permitted to hear Brown II. The record shows that Weiner and Duhe used an abuse of discretion by

(1)allowing themselves to sit on the panel for Brown II even though Brown wrote motions and letters trying to make sure that they have no part in Brown II.

(2)Weiner and Duhe ruled on Brown's motions that they be reclused from Brown II. This does not even have the appearance of justice. New evidence shows that Weiner and Duhe had erred in ruling that Brown had been given an hearing. Why would Weiner and Duhe even permit themselves to sit on Brown II panel?

(3) Brown had 14 days to file a Petition for Rehearing En Banc. Brown filed a

Motion To Extend Time for Filing Appellant's Petition for Rehearing on January 25 (See Appendix K) and the 5th Circuit indicated that this motion was filed on January 27. Brown waited to hear from the court; she did not hear from the court until February 4. So Brown filed her Petition For Rehearing En Banc and Brown filed the Petition for Rehearing En Banc on February 9. See Appendix K. This shows that the Petition for Rehearing En Banc was not late. Again Weiner and Duhe or 5th Circuit used an abuse of discretion by not allowing Brown's Petition for Rehearing En Banc. This is in violation of federal rules. The rules allowing petitions for rehearing in almost every American jurisdiction reflect general judicial recognition that appellate courts may make mistakes, and that they should be accorded an opportunity to correct them by permitting the losing party to call the

alleged errors to their attention. Halliburton v. Walker, 326 U.S. 696, 327 U. S. 812 (1946)

(4)Weiner and Duhe again used an abuse of discretion by not considering the En Banc petition and BY DISCARDING the 20 bounded copies of Petition for Rehearing. See Appendix I. The 5th Circuit did not know when Brown received the February 17 letter. Previously, this court has sent briefs back to Brown, and why didn't this court send back the Petition for Rehearing En Banc?.

CONCLUSION

The 5th Circuit's judgment conflicts with many authorities. The 5th Circuit panel consisting of Weiner and Duhe claims that the hearing issue has been settled. But new evidence in Brown II-1993 shows that no hearing has been held. Using res judicata incorrectly is just a tool to deny Brown her constitutional rights.

"Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Kremer v. Chemical Construction Corp. 456 US 481 (1981)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 11th day of April 1995, a true copy of Petition for Writ of Certiorari has been forwarded to

Attorney Jeffrey Horner
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002

Marvinell Brown

Marvinell Brown
5722 Tiffany
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GIVEN UNDER MY HAND AND SEAL OF OFFICE:

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

NOTARY PUBLIC STATE OF TEXAS
NEIDA MONTEZ
Notary Public, State of Texas
My Commission Expires 11-22-97

APPENDIX A

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20361 U.S. COURT OF APPEALS

Summary Calendar FILED JAN 13 1995

CHARLES R. FULBRUGE, CLERK

MARVINELL BROWN,
Plaintiff-Appellant,

VERSUS

HOUSTON INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-93-2380)

Before JONES, DUHE, and STEWART, Circuit Judges.

PER CURIAM:[1]

Marvinell Brown appeals the district court's dismissal of her lawsuit in which she asserts seven constitutional, statutory, and state law causes of action against the Houston Independent School District (HISD), and a host of individuals

in both their individual and representative capacities. The district court dismissed Brown's lawsuit because of res judicata and limitations. We affirm.

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1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

The HISD placed Brown, a schoolteacher, on indefinite medical leave as of January 19, 1989. In response, Brown sued the HISD alleging due process violations, race discrimination, breach of contract, and tort claims. The district court granted summary judgment to the HISD. Brown v. Houston Indep. Sch. Dist., 763 F. Supp. 905, 909 (S.D. Tex. 1991), aff'd, 957

F.2d 866 (5th Cir.), cert. denied, 113 S. Ct. 198 (1992).

Brown then filed this lawsuit in 1993, asserting constitutional claims based on the Due Process Clause and the First Amendment, statutory claims based on the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Act of 1964, and state law claims for intentional infliction of emotional distress, breach of contract, and tortious interference with business relations. All her claims stem from her placement on medical leave status. The individuals she includes in this new lawsuit are employees of the HISD. The district court granted the HISD's motion to dismiss on grounds of res judicata and limitations. Brown appeals.

DISCUSSION

Because the HISD's motion contained exhibits, we treat the district court's dismissal as a summary judgment under

Federal Rule of Civil Procedure 56. Our review under Rule 56 is de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209 212 (5th Cir. 1990).

Res judicata prevents two parties from relitigating a cause of action already adjudicated. Res judicata bars a subsequent cause of action when (1) both suits involved identical parties, (2) the prior suit adjudicated on the merits by a court of competent jurisdiction, and (3) the same cause of action was involved in both cases. Miller v. United States Postal Serv., 825 F.2d 62, 63-64 (5th Cir. 1987). Both parties agree that the prior suit was adjudicated on the merits.

Brown asserts that the individual defendants in this suit make the parties different, and that her new legal theories made the cause of action different. We disagree. Res judicata applies to parties in privity with the parties named in the

previous suit. See Nevada v. United States, 463 U.S. 110, 29-30 (1983). The individual HISD employees are in privity with the HISD; therefore, we consider the same parties to be involved in both suits. As to the causes of action, whether Brown advances different legal theories this time around is of no moment. The question is whether she could have advanced these legal theories in her prior lawsuit. See Miller, 825 F.2d at 64. All her legal theories arise from placement on medical leave. Brown could have consolidated all her legal theories in her prior lawsuit. We conclude that the district court properly dismissed Brown's suit because of res judicata. We need not decide whether Brown's causes of action were barred by limitations.

CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

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NEW ORLEANS, LA 70130

FEBRUARY 17, 1995

Mr. Marvinell Brown
5722 Tiffany
Houston, Tx 7785

No. 94-20361 Marvinell Brown v. Houston Ind. School Dist.

(DC# CA-H-93-2380)

Dear Sir:

In light of this Court's order of February 2, 1995, no action is being taken on your "Motion To File Late" or your petition for rehearing en banc. If you wish to have your unfiled motion and unfiled rehearing returned to you, you should contact this office within ten days from this date in order to make financial arrangements for their return. Failure to contact this office by the expiration of the ten days, the material will be discarded.

Please be advised that your next right of review is by filing a petition for writ of

certiorari to the United States Supreme Court. The time for filing a petition for writ of certiorari is 90 days from the date of this Court's opinion or by not later than April 13, 1995.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By_____
MaryBeth Kenney
Case Manager

MBK:lmc
cc: Mr. Jeffrey J. Horner

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED APR 21 1994
Michael N. Milby, Clerk

MARVINELL BROWN, Plaintiff

§ C.A. NO. H-93-2380

VS.

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al Defendants

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Motion of Dismiss (Dkt. entry #11). Having considered the motion, response, and the applicable law, the Court finds that Defendant's motion should be granted.

This is the second of two lawsuits filed by Plaintiff against Defendant Houston Independent School District (HISD). Defendants Frank Petruzielo, Joan Raymond,

Mattye Glass, Don Jones, Ruben Lopez, Irene Kerr, and Jan Price, individually and in their official capacities as past and present HISD officials, were not named in the first lawsuit. The first lawsuit, Brown v. HISD, 763 F. Supp. 905 (S.D. Tex 1991), aff'd, 957 F. 2d 866 (5th Cir.), cert. denied, 113 S. Ct. 198 (1992) (Brown I) was filed in 1989 after HISD officials place Plaintiff on medical leave for perceived psychological problems which interfered with her ability to carry out her classroom duties. Plaintiff was placed on leave for an indefinite period of time, which was paid until her accumulated personal time was exhausted. Plaintiff has never been terminated.

In Brown I, Plaintiff alleged racial discrimination, breach of contract, violation of her due process rights, and various tort claims. The Court gave due consideration to the merits of all such

claim, and entered summary judgment in HISD's favor. Brown 763 F. Supp. at 909. The judgment was appealed to the Fifth Circuit and affirmed in 1992. Brown, 957 F.2d at 866. This suit was filed August 4, 1993, and Plaintiff alleges due process violations, free speech deprivation, age and disability discrimination, and violations of the Texas Education Code. Defendants urge that all of Plaintiff's claims are barred by the doctrine of res judicata and/or the applicable statutes of limitation. The Court agrees.

For a prior judgment to bar an action on the basis or res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases. Miller v. U.S. Postal

Serv., 825 F.2d 62,63 (5th Cir. 1987); Nilsen v. City of Moss Point, Mississippi, 701 F.2d 556, 559 (5th Cir. 1983). There is no doubt that the judgment in Brown I was a final judgment on the merits, rendered by a court of competent jurisdiction.

Plaintiff contends that she has a new cause of action in this suit, but her argument is unavailing. This suit obviously arises from the same controversies as those litigated in Brown I. Plaintiff is still contesting the HISD officials' act of placing her on leave in 1989. The principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action. Nilsen, 701 F.2d at 559. That test is met here. Although Plaintiff claims that the current Board gives new reasons for maintaining her leave status and refusing to reinstate her, new causes

of action are not created every time the HISD officials response to Plaintiff's continuing complaints. The 1989 act of placing Plaintiff on leave was the basis for her 1989 claims and the same operative facts are the root of her complaints herein. Plaintiff complains that the Board should not be able to keep her on leave indefinitely without terminating her, but the Court does not have a continuing duty to referee employment relationships.

Plaintiff also alleges that she has a new cause of action simply because she has asserted new statutory and common law claims for relief. This argument is also futile, because of doctrine of res judicata bars all claims that were or could have been advanced in Brown I. Uithoven v. U.S. Army Corps of Engineers, 884 F.2d 844, 847 (5th Cir. 1989); Nilsen 701 F.2d at 560.

Plaintiff further claims that the Fifth Circuit was "erroneous" in its ruling, and that she is therefore entitled to reconsideration. Despite the fact that Plaintiff is obviously displeased with the Court's 1992 decision, the Court cannot and will not reopen and reconsider the merits of Plaintiff's cause of action simply because she is still discontent.

As far as identity of parties is concerned the Court finds that the individual defendants' interests are identical to the HISD's interests. The superintendents, principals, and board members, both past and present, are merely nominal parties; HISD is the real party-in-interest. Thus, res judicata bars Plaintiff's claims against all Defendants herein. See Slaughter v. AT&T Information Systems. Inc., 905 F.2d 92,94 (5th Cir. 1990).

Alternatively, Plaintiff's claims are barred by the statutes of limitation. Plaintiff was placed on leave on January 19, 1989. This lawsuit was filed over four and one-half years later, which is untimely under any applicable statute of limitations

It is therefore ORDERED that the Defendants' Motion to Dismiss is GRANTED, and Plaintiff's claims herein are DISMISSED with prejudice. It is further ORDERED that Plaintiff is prohibited from pursuing ant further lawsuits against the HISD or its representatives in this Court without obtaining the Court's approval prior to service of process. Any further action taken in violation of this order will result in automatic dismissal and possible monetary sanctions.

Signed this *18th* day of *April,* 1994

/s/ *John D. Rainey*

John D. Rainey

United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-2634
Summary Calendar

MARVINELL BROWN,
Plaintiff-Appellant,

VERSUS

HOUSTON INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-89-908)

(February 25, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges. [1]

PER CURIAM:

The Plaintiff in this case, Marvinell Brown, feels that she was unconstitutionally placed on medical leave from her job as a high school teacher. Because we conclude that Ms. Brown presented no genuine issues of material fact on her constitutional, federal statutory, or state law claims, we affirm the summary judgment render for the Defendant.

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1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

As a preliminary matter, there are a number of outstanding motions before this Court. We have previously granted Ms. Brown's motion to file a brief not in excess of fifty-seven pages but denied her

motions for appointment of counsel and injunctive relief. Her "Motion for Leave to File a Reply Brief in Excess of the Page Limitation" remains to be ruled on. The Appellee, Houston Independent School District, has moved to strike her reply brief and the addendum to her original brief. Because of our desire to be sure that we understand all of the arguments of Ms. Brown, who is currently proceeding without counsel, we grant her motion and deny the HISD's motions. We hasten to add that Ms. Brown should not feel free to ignore our page limitations in the future. She has imposed a ponderous and unwarranted burden on opposing counsel and this Court, and we admonish her to adhere strictly to our rules if she should ever have occasion to file papers before this Court again.

II.

A.

Ms. Brown has been a tenured teacher with the Houston Independent School

District, but her principal, J. Don Jones, became concerned that her emotional health was interfering with her ability to continue in the classroom. He therefore referred Ms. Brown to the HISD's Health Services office and listed the following perceived "behavior patterns":

1. Explodes with administration-unprofessional behavior

2. Fears someone is going to harm her

3. Refusal to be observed

4. Fears that she might lose control

5. Some days she appears to be alert and on others she appears to be detached.

6. Multiple incidents of the Panic button being pushed in her classroom

7. Unprofessional behavior - dialing 911 because of a poor assessment. She filed the complaint in Dr. Jones's and her name against Anne McClellan, Assistant Principal, for assault.

1 R. 172. Reason number 7 refers to an incident in which Ms. Brown called the police because Ms. McClellan gave her a bad evaluation; Ms. Brown felt that she was the victim of discrimination.

Ms. Brown's calling the police apparently precipitated the referral to Health Services. Mattye Glass, director of that bureau, told Ms. Brown that she should be evaluated by a psychiatrist of her choice. The psychiatrist whom Ms. Brown chose, Estella Robinson, recommended that Ms. Brown be restricted from the classroom until further evaluation and treatment, and Dr. Glass accordingly recommended that Ms. Brown be placed on health leave.

After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral. After she was placed on leave, she was informed in a letter of her "right to present testimony or other information of relevance pertaining to your fitness to continue as a teacher." Id. at 183. As a result of this letter, Ms. Brown again met with Dr. Glass to voice her concerns and to present

letters from another psychiatrist, John Wade, and other professionals. Dr. Wade concluded that "Miss Brown does not appear to fulfill the requirement for any mental disorder as described in the DSM III-R. As such, there is no apparent reasons from a psychiatric standpoint to preclude her returning to her job." 2 id. at 253.

Dr. Glass felt that a third opinion was as yet unwarranted because Dr. Wade had qualified his recommendation by stating that it was "based solely on one clinical examination and testing, and does not include information from other sources which may provide additional insight into this situation." Id. Dr. Glass said that she would provide information to Dr. Wade from the HISD, if Ms. Brown so requested, and if Dr. Wade reached the same conclusion then "it may be necessary to obtain a third opinion." 1 id. at 185-86. The record does

not show any further involvement by Dr. Wade, however.

After filing complaints with the Equal Employment Opportunity Commission, Ms. Brown received two right-to-sue notices, dated September 6, 1988, and June 28, 1989. She filed this suit in district court on March 20, 1989. After considerable pretrial proceedings, the district court entered summary judgment for the Defendant on January 17, 1991. Ms Brown thereafter filed a number of motions to reconsider. Her Notice of Appeal was filed the same day as a pleading entitled, "Second Motion for Reconsideration of Granting of Defendant's Motion for Summary Judgment & Motion for Oral Hearing" and is proper under Brown v. United Insurance Co. of America, 807 F.2d 1239, 1242 (5th Cir. 1987).

III.

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Cov. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F. 2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational

trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 575, 587 (1986).

IV.

Ms. Brown has based her suit on a number of different legal theories. We address in turn each of her remaining claims that are legally cognizable. Ms. Brown makes a number of arguments that, as best we can deduce, do not constitute legally cognizable causes of action. We do not discuss these argument. Also, a party that inadequately briefs an issue is considered to have abandoned the claim. Villanueva v. CNA Ins. Cos., 868 F. 2d 684, 687 n.5 (5th Cir. 1989); Harris v. Plastics Mfg. Co., 617 F. 2d 438, 440 (5th Cir. 1980). We therefore do not discuss any claim she may or may not have under 42 U.S.C. § 1981 (1988).

A.

Ms. Brown contends that the HISD violated her right to procedural due process under the Fourteenth Amendment. Under Cleveland Board of Education v. Loudermill, a public employee with a property right in continued employment is entitled to "notice and an opportunity to respond." 470 U.S. 532, 538, 546 (1985). The HISD does, not dispute that Ms. Brown had a property right and was due some process, its argument is that she was given all the process she was due. We agree. Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion

might have been warranted. In short, she was given pretermination notice and hearing, and the HISD acted reasonably.

We understand that Ms. Brown would have liked to have been given the reasons for referral sooner, and would have preferred an earlier, more elaborate hearing. But both notice and an opportunity to present her side to Dr. Glass were given before her salary payments were stopped and before she was terminated. As far as the record shows, in fact, Ms. Brown still has not been terminated. Even if we assume, for the sake of argument, that the Due Process Clause would be implicated by a cessation of salary payments without formal termination, the minimal procedural requirements set out in Loudermill have been satisfied. "To require more than this prior to termination intrude to an unwarranted extent on the

government's interest in quickly removing an unsatisfactory employee." Id. at 546.

B.

Ms. Brown also asserts a claim under the First Amendment; she says that the HISD retaliated against her because she exercised her free speech rights by going to the police. This expression is not the sort of speech protected by the legal theory that she invokes, however. In Connick v. Myers, the Supreme Court held that speech by public employees is constitutionally protected only if it is of a public, as opposed to a private, nature. Connick, 461 U.S. 138, 146-48; Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 797 (5th Cir. 1989) (construing Connick). cert/ denied, 110 S. Ct. 2620 (1990). Even if we assume that the matters that moved Ms. Brown to call the police were matters of public concern, complaining about them to the police is communication that is of a

private nature. Her First Amendment claim is therefore without legal merit.(2)Footnote

(2)Footnote:

Footnote (2) We acknowledge Ms. Brown's argument that calling the police was less threatening to the District than talking to the media. This argument is irrelevant under the First Amendment, however.

C.

Ms. Brown also invokes 42 U.S.C. § 1983 (1988). She has not stated a cause of action under this section, however. To survive a motion for summary judgment, she must allege and offer summary judgment proof of an official government policy or practice that is unconstitutional. City of St. Louis v. Praprotnik, 485 U.S. 112, 128 (1988). She has failed to create a genuine issue of material fact as to whether the HISD had such a policy or practice, and

summary judgment for the Defendant is therefore appropriate.

D.

We turn next to Ms. Brown's title VII claims. Her first right-to-sue notice was issued by the EEOC on September 6, 1988, and she had ninety days to file suit. See 42 U.S.C. § 2000e- 5(f) (1) (1988). She did not file suit until March of 1989, and her suit was therefore untimely. Ms. Brown received a second notice of her right to sue in June of 1989, during the pendency of her action, and she argues that her action may be maintained because of this second notice. After painstaking examination of the record, we understand her argument. We find that it is not legally meritorious, however.

Ms. Brown did not file the second notice in the district court before summary judgment. Nine days after that judgment was rendered, in January of 1991, she filed a "Motion

that Court Grant Plaintiff an Opportunity to Re-Present Facts & an Extension," to which she appended the second right-to-sue notice. The motion and exhibits, however, appear to have been lost by the district court, and Ms. Brown is understandably upset by this clerical error.

Legally, though, even if there had been no clerical error, the letter would still have been filed too late. In order to state a claim upon which relief can be granted under title VII, a plaintiff must complain to the EEOC and obtain a notice of the right to sue. The Plaintiff must then file suit within ninety days. See Id. As the district court held, her suit was not timely filed relative to the first notice of a right to sue. When Ms. Brown received the second notice, although her suit was already pending, she might have maintained her action by amending her complaint and filing the second notice

within ninety days. See Pinkard v. Pullman-Standard, Div. of Pullman, Inc., 678 F.2d 1211, 1215 (5th Cir. Unit B 1982), cert. denied, 459 U.S. 1105 (1983). Because she failed to do so, and because the district court could not have considered the second notice before the court rendered summary judgment, Ms. Brown did not present a viable title VII claim to the district court. Summary judgment for the Defendant is therefore appropriate.

We understand that Ms. Brown was proceeding pro se for at least part of the time that she was litigating in the district, but there are a limited number of allowances that a court will make for pro se parties. The district court considered a number of Ms. Brown's motions after rendering summary judgment, and the court has discretion to grant or deny post-judgment motions of this sort. Although the first motion was lost, later motions by

Ms. Brown brought the court's attention to the clerical error. We find no abuse of discretion in the court's refusal to change its judgment.

E.

We now address the procedural issues pressed by Ms. Brown. The district court denied her motion to add defendants because it was untimely. Ms. Brown contends that the court's scheduling order was not in accord with Rule 21 of the Federal Rules of Civil Procedure. We disagree. Trial courts have broad discretion in regulating their dockets and imposing scheduling deadlines on litigants. E.g., Teal v. Eagle Fleet, Inc., 933 F.2d 341, 346 (5th Cir. 1991). We have examined the deadlines imposed by the court, and it did not abuse its discretion on either in setting them as it did or in denying Ms. Brown's untimely motion to add defendants.

Nor did the court abuse its discretion in allowing Ms. Brown's second attorney to withdraw. Ms. Brown filed numerous pro se motions while she was represented by her second attorney, refused to communicate effectively with her attorney, and filed a grievance with the state bar and the television media against her attorney. The district court properly allowed him to withdraw.

F.

Last, we address Ms. Brown's state law claims. Ms. Brown never created a genuine issue of fact as to whether the HISD breached its contract with her. Nor did she raise a fact issue that would have deprived the HISD of the immunity it enjoys under state law. See Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978).

V.

For the reasons set out in part I, we GRANT Appellant's motion to file a reply

brief in excess of the page limit and DENY Appellee's motions to strike. For the reasons expressed in the remainder of this opinion, we AFFIRM the judgment of the district court in all respects.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED JAN 17 1991
JESSE E.CLARK, CLERK
By Deputy: N. Smith

MARVINELL BROWN, Plaintiff,

vs.) CIVIL ACTION NO. H-89-908

HOUSTON INDEPENDENT SCHOOL DISTRICT, Defendant.

MEMORANDUM AND ORDER

Pending before the Court are the motion for leave to file supplemental

complaint and to add defendants (#55) submitted by plaintiff, Marvinell Brown ("Brown"), and the motion for summary judgment (#56) submitted by defendant, Houston Independent School District ("HISD"). After considering the motions, the responses and the applicable law the Court is of the opinion that the motion for summary judgment and for leave to file a supplemental complaint should be granted and the motion to add defendants should be denied.

I. BACKGROUND

Plaintiff, Marvinell Brown ("Brown"), has been continuously employed by HISD since August 1984. In January of 1989, she was placed on medical health leave under HISD policy because HISD officials perceived that she suffered from emotional problems which interfered with and jeopardized the successful performance of her classrooms duties. Under the

policy, such leave is paid until an employee exhausts all accumulated personal leave. At that point, the leave becomes unpaid. At no time has HISD terminated Brown.

In response Brown filed suit against HISD asserting causes of action for due process violations, racial discrimination, state law breach of contract, and state law tort claims. HISD now moves for summary judgment on all of these causes of action.

II MOTIONS TO FILE SUPPLEMENTAL COMPLAINT AND ADD DEFENDANTS

As an initial matter the Court notes that HISD does not oppose the motion to file a supplemental complaint, and although HISD has not answered the supplemental complaint, it has been filed. For purposes of considering HISD's motion for summary judgment the Court shall look to the allegations contained in the supplemental complaint.

With regard to Brown's motion to add defendants, the Court observes that the time for adding parties stated in the scheduling order has lapsed. Furthermore, Brown offers no explanation for failing to add these parties within the time provided. Consequently, Brown's motion is untimely and should be denied.

III. THE STANDARD FOR SUMMARY JUDGMENT

Rule 56 (c) provides that "(summary) judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of genuine issue of material fact. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Williams v. Adams, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. Id.

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. See Celotex, 106 S. Ct. at 2552-53. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505,2514 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. Williams v. Weber Management Serv., 839 F.2d 1039, 1041 (5th Cir. 1987) There must be evidence giving rise to reasonable inference that support the nonmoving party's position. St. Amant. v. Benoit, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. Lodge Hall Music, Inc. v.

Waco Wrangler Club, Inc. 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S. Ct. at 2513. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Ind. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. Honore v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987).

IV. DUE PROCESS CLAIMS

Brown alleges that she has been deprived of property without the constitutional protection provided by the Due Process Clause. Specifically, she claims that by being placed on unpaid medical health leave by HISD she was deprived of her property interest in continued employment. In addition, Brown claims that the manner in which she was placed on unpaid medical leave violated her due process rights.

HISD acknowledges that Brown, as a tenured teacher, has a property interest in her continued employment by HISD. Therefore, Brown's property right to continued employment is one to which the Due Process clause applies. See Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1493 (1985). Having stipulated that a property right existed the issue is what process is due.

As the Supreme Court articulated in Loudermill (a) tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story . . . ." Id. at 1495. The undisputed facts establish that Brown received more than the minimum due process required under this standard.

Specifically, Brown was provided with written notice of the proposal to place her on medical leave, an oral explanation of the reasons for this action. Following the notification and explanation Brown was given the opportunity to respond by undergoing a psychiatric examination by Dr. Mattye Glass, a psychiatrist of her choosing. The conclusion of Dr. Glass was that medical health leave was appropriate and Brown should be restricted from the classroom. Accordingly, there being no

genuine dispute as to the notice, explanation and opportunity to respond afforded Brown, the Court concludes that Brown received due process consistent with that mandated by Loudermill and HISD is entitled to summary judgment on this claim.

V. RACE DISCRIMINATION CLAIM

Brown also alleges that she was the victim of racial discrimination. She seeks damages under Title VII, section 1981 and section 1983. In pursuit of her Title VII claim Brown filed a claim with the Equal Employment Opportunity Commission ("EEOC") concerning this allegation in January of 1988. In September of 1988, the EEOC found no reasonable cause to believe that Brown had been subject to racial discrimination, and issued a right-to-sue notification letter dated September 6, 1988. Brown did not commence this action until March of 1989.

After receipt of a right-to-sue letter, a Title VII litigant must commence her action within ninety (90) days. The Supreme Court has held that compliance with the filing deadlines enunciated under Title VII is a jurisdictional prerequisite, and the failure to comply is ground for dismissal. (cite). Because Brown has failed to satisfy this jurisdictional prerequisite, HISD is entitled to judgment on this claim as a matter of law.

Brown's claims under section 1981 must likewise fail. In Jett v. Dallas Independent School District, __U.S.___, 109 S.Ct. 2702 (1989), the Supreme Court held that governmental entities, such as school districts, can no longer be held liable under section 1981. Id. 2722. Instead, section 1983 provides the exclusive remedy for the rights guaranteed by section 1981 when the claim is pressed against a state actor. Id. Therefore, Brown's

allegation under section 1981 fail to state a claim upon which relief may be granted and HISD is entitled to summary judgment as a matter of law.

An education institution may not be held liable for constitutionally deficient acts of its employees under the doctrine of respondeat superior. City of St. Louis v. Praprotnick, 485 U.S. 112 (1987). Rather, to state a claim against an educational institution under section 1983 for acts of subordinate employees, a plaintiff must allege that officials acted in accordance with an official government policy or firmly entrenched custom that deprived the plaintiff of constitutional rights. See Worsham v. City of Pasadena, 881 F.2d 1336, 1339 (5th Cir. 1989) (citing Monell v. City of New York Dept. of Social Services, 436 U.S. 658, 694 (1978)).

The Fifth Circuit has held that to establish "an official government policy

or firmly entrenched custom" a plaintiff must show that the constitutional deprivation was inflicted by:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributed to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).Brown's complaint is devoid of any allegation that the claimed constitutional deprivations were the result of an official government policy or firmly entrenched custom. Consequently, Brown has failed to state a claim under section 1983 upon which relief may be granted.

VI. STATE LAW TORT CLAIMS

Brown asserts pendent state tort claims alleging intentional infliction of emotional distress, wrongful discharge, tortious interference with business relations and defamation. In response HISD seeks summary judgment under the doctrine of governmental immunity.

Under Texas law a school district exercising governmental functions is an agency of the state and is immune from suits predicated on the torts of its employees, except as specifically provided in the Texas Tort Claims Act. See Hopkins v. Spring Independent School District, 736 S.W.2d 617 (Tex. 1987); Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978). Because Brown has not brought any of her claims within any of the exceptions articulated in the Texas Tort Claims Act, HISD is entitled to summary judgment on each of Brown's state law tort claims as a matter of law.

VII. BREACH OF CONTRACT

Finally, Brown asserts a claim for breach of contract, alleging that HISD breached its contract with her by placing her on medical health leave. The undisputed facts establish that Brown was placed on medical health leave consistent with the terms and conditions of her contract. There being no evidence of breach on the part of HISD, it is entitled to judgment as a matter of law.

ORDER

In accordance with the foregoing, it is **ORDERED** that plaintiff's motion to reinstate is hereby **GRANTED**. It is further

ORDERED that plaintiff's motion for leave to file supplemental complaint is hereby GRANTED. It is further

ORDERED that plaintiff's motion to add defendants is hereby **DENIED**. It is further

ORDERED that defendant's motion for summary judgment is hereby **GRANTED**.

Signed this 16th day of January, 1991.

/s/ Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX F

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourteenth Amendment of the Constitution provides in part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

42 U.S.C. 12112

(a) GENERAL RULE.-No covered entity shall discriminiate against a qualified individual with a disability because of the disablity of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, coonditions, and privileges of employment.

(c) MEDICAL EXAMINATIONS AND INQUIRIES.

(1) IN GENERAL.-The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

42 U.S.C. § 12112(c)(4)(A)

(4) EXAMINATION AND INQUIRY

(A) PROHIBITED EXAMINATIONS AND INQUIRIES.-A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C 12111(12118) Section effective 24 months after July 26, 1990.

APPENDIX H

29 U.S.C § 701

(b) The purposes of this chapter are--

(1) empower individuals with disabilitites to maximize employent, economic self-sufficiency, independence, and inclusion and integration into society, through-

(F) the guarantee of equal opportunity; and

29 U.S.C § 701 29 U.S.C. 794 (**Section 504 of the Rehabilitation Act of 1973**);

29 U.S.C § 793 Sections 501 503

No otherwise qualified individual with handicaps in the United States * * *shall, solely by reason of her or his handicap, be excluded from the participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance* * * *

APPENDIX I

TITLE VII

42 U.S.C. § 2000e-2

"It shall be unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-3(a)

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other

training or retraining, including on-the-job training programs to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter (42 U.S.C. §§ 2000e to 2000e-17), or because he has made a charge, testified, asssisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (42 U.S.C. §§ 2000e to 2000e-17)."

Title 42 USC § 1983 provides in full: "Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX J

Texas Education Codes

§ 13.107 Each teacher with whom a continuing contract has been made as herein provided shall be entitled to continue in his position or a position with the school district, at a salary authorized by the board of trustees of said district complying with the minimum salary provisions of the foundation aid law, for future school years without the necessity for annual nomination or reappointment, until such time as the person:

(3) is discharged for lawful cause, as defined in Section 13.109 of this code and

in accordance with the procedures herein after provide:

13.111 Notice

"(a) Before any teacher shall be discharged during the year for any of the causes mentioned in Section 13.109 of this code, ...or before any teacher holding a continuing contract shall be dismissed or returned to probationary contract status at the end of a school year for any, of the reasons mentioned in Section 13. 110 of this code, he shall be notified in writing by the board of trustees or under its direction of the proposed action and of the grounds assigned therefor.

(b) In the event the grounds for the proposed action relate to the inability or failure of the teacher to perform his assigned duties, the action shall be based upon the written recommendation by the superintndent of schools, filed with the board of trustees. Any teacher so

discharged or dismissed or returned to probationary contract status shall be entitled, as a matter of right, to a copy of each and every evaluation report, or any other memorandum in writing which has been touching or concerning the fitness or conduct of such teacher, by requesting in writing a copy of the same."

§ 13.112 Hearing

"(a) If, upon written notification of the proposed action, the teacher desires to contest the same, he shall notify the board of trustees in writing within 10 days after the date of receipt by him of the official notice above prescribed, of his desire to be heard, and he shall be given a public hearing if he wishes or if the board of trustees determines that a public hearing is necessary in the public interest.

(c) Within 10 days after request for hearing made by the teacher, the board of trustess shall fix a time and place of

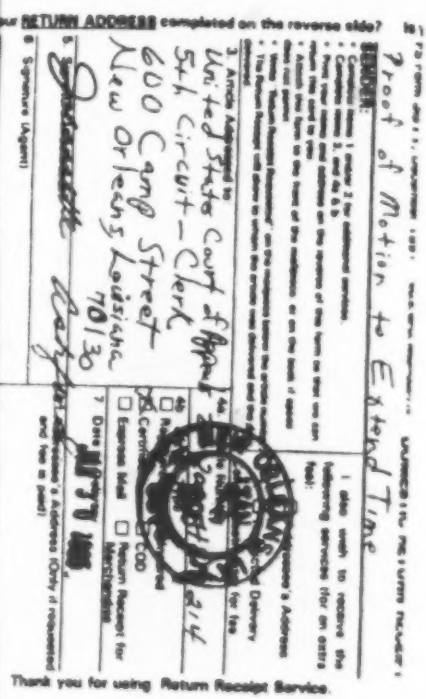
hearing, which shall be held before the proposed action shall be effective. Such a hearing shall be public unless the teacher requests in writing that it be private.

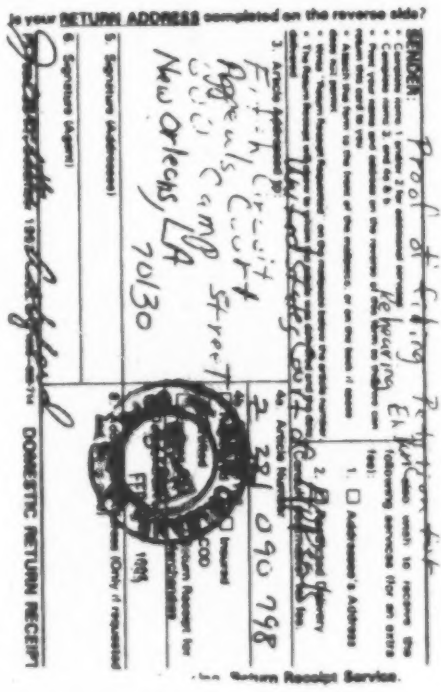
(d) At such hearing, the teacher may employ counsel, if desired, and shall have the right to hear the evidence upon which the charges are based, to cross-examine all adverse witnesses, and to present evidence in opposition thereto, or in extenuation."

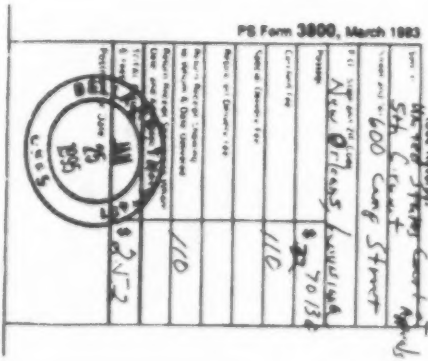
§13.905

"(c) The governing board of a school district may adopt a policy providing for placing an employee on leave of absence for temporary if, in their judgment and in consultation with a physician who has performed a thorough medical examination of the employee, the employee's condition interferes with the performance of regular duties.

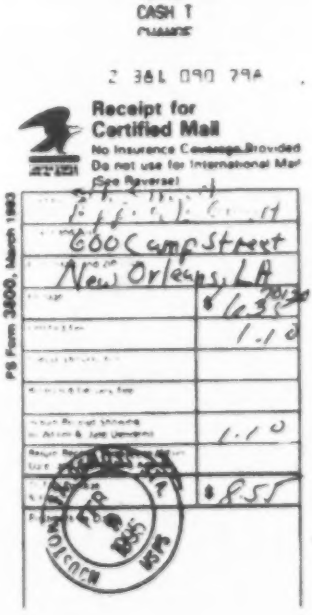
(f) The length of leave of absence for temporary disability shall be granted by the superintendent as required by the individual employee. The governing board of a school district may establish a maximum length for a leave of absence for temporary disability, but in no event shall that maximum be set at less than 180 days."







Proof of Motion to Extend Time
Brown mailed this motion on Jan.25



Proof of mailing
Petition for Rehearing En Banc.

BEST AVAILABLE COPY

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. 94-1700

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARVINELL BROWN, *Petitioner,*

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT, et.al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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School District, et.al.

QUESTIONS PRESENTED

I. Whether the Petitioner is entitled to the granting of her petition for writ of certiorari.

II. Whether the trial court and the Fifth Circuit Court of Appeals properly granted and affirmed summary judgment for the Respondents, based upon the doctrines of res judicata and statute of limitations.

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SUMMARY OF ARGUMENT

I. The Petitioner is not entitled to the granting of her petition for writ of certiorari. Under the Rules of the United States Supreme Court, certiorari is granted only for the purposes of resolving unsettled, unique, or unusually significant questions of law. This case involves well-settled principles of law that were properly applied by the courts below. Furthermore, this Court limits the granting of certiorari to questions of broad importance. There are no questions of broad importance presented in this case. Accordingly, the Petitioner's request for the granting of writ of certiorari should be denied.

II. Further, the trial court and Fifth Circuit Court of Appeals properly granted and affirmed summary judgment for the Respondents. The rulings by these courts were based on the res judicata and statute of limitations defenses. This lawsuit is the second lawsuit filed by the Petitioner regarding her placement on medical leave in January of 1989 by the Houston Independent School District ("District"). Her first lawsuit was dismissed at the trial court level. The Fifth Circuit affirmed the dismissal, and this Court denied a petition for writ of certiorari. See 113 S. Ct. 198 (1992). This second lawsuit arose out of the same operative facts and alleges essentially the same causes of action, i.e., violation of due process, discrimination based on race and disability, and various state law claims. As the trial court and the Fifth Circuit both determined, the Petitioner's allegations are duplicitous of her first lawsuit and are thus barred by res judicata.

Further, the Petitioner's claims are barred by statute of limitations. The present lawsuit was filed over four and one-half years after the Petitioner's placement on medical leave. Her claims are untimely under any applicable statute of limitations. Therefore, while the Fifth Circuit did not address this issue, the trial court correctly determined that the Petitioner's claims were barred by limitations.

ARGUMENTS AND AUTHORITIES

I. The Petitioner is Not Entitled to the Granting of her Petition for Writ of Certiorari

Rule 10 of the Rules of the United States Supreme Court specifies that a petition for writ of certiorari shall be granted only when there are special and important reasons therefor. No such reasons are presented in this case. A writ of certiorari is generally granted to resolve a split of authority among the circuit courts of appeal or to resolve important unsettled questions of federal law. In contrast, the law governing this case is well settled, and the case was properly decided by the trial court and the Fifth Circuit.

This Court exists to serve as a final arbiter of questions of major legal importance. See *Watt v. Alaska*, 451 U.S. 259, 101 S.Ct. 1673 (1981). It is irrelevant that a question is of importance to a particular party; this Court limits its review to questions of broad importance. See *Rice v. Sioux City Cemetery*, 349 U.S. 70, 75 S.Ct. 614 (1955). There are no questions of broad importance presented in this case, nor are there any unsettled questions of law. This case primarily involves whether the Petitioner's claims are barred by res judicata and/or statute of limitations; the trial and appellate courts determined that her claims were barred. Indeed, the courts below acted in accordance with Supreme Court and other legal precedents in granting and affirming summary judgment in favor of the Respondents. In sum, it is clearly inappropriate to grant a petition for writ of certiorari in this case, and the Petitioner's request should be denied.

II. The Petitioner's Claims Fail as a Matter of Law Under the Doctrines of Res Judicata and Statute of Limitations

A. Res Judicata

For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, and the same causes of action must be involved in both cases. See *Miller v. U.S. Postal Service*, 825 F.2d 62 (5th Cir. 1987). The parties agree that the judgment in the Petitioner's first lawsuit was a final judgment rendered by a court of competent jurisdiction. Thus, the primary questions on appeal involve the identity of the parties and the causes of action asserted by the Petitioner.

As the Fifth Circuit stated in *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (en banc): "It is black letter law that res judicata bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated." 701 F.2d 556, 560. The court continued: "It is equally settled that one who has a choice of more than one remedy for a given wrong . . . may not assert them serially, but must advance them all at once." Id. Nearly all of the Petitioner's claims in her current lawsuit were raised and adjudicated in her first lawsuit. Her argument that she has asserted new causes of action in the present suit is unavailing. The present suit obviously arises from the same controversy fully litigated in the prior lawsuit (i.e., her placement on medical health leave). The

test for comparing causes of actions is whether the primary right and duty or wrong are the same in each action. Id. at 559. That test is met in the present case.

The Petitioner alleges that res judicata does not apply because she has asserted new statutory claims for relief in her second lawsuit. Again, res judicata bars all claims that were or could have been advanced in the prior suit. See *Nilsen*; *Miller*. The statutory claims raised in the second lawsuit by the Petitioner could have been raised in the prior lawsuit. For example, in her second suit she asserts claims under 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act) and 42 U.S.C. § 12101, et seq, the Americans with Disabilities Act (ADA). Section 504 was enacted in 1973, and the ADA was signed into law in 1990. Both of these statutes existed at the time her first lawsuit was litigated. Her attempt to assert these claims at this late date is the type of activity that runs to the core purpose of the res judicata doctrine. Parties simply are not entitled to a "second bite of the apple" for claims that were not properly asserted in prior litigation.

Even if, for the sake of argument only, these claims could not have been asserted in her first lawsuit, the Petitioner is precluded from raising them in a second lawsuit arising out of the same operative facts after final judgment was rendered in the first case. Res judicata bars subsequent litigation under the same operative facts after a final judgment is rendered, even though theories of recovery may differ. As both this Court and the Third Circuit have stated, a plaintiff cannot relitigate a case based on new legal theories or statutory claims created after final judgment is rendered. See, e.g., *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716 (1975) (a plaintiff's 42 U.S.C.

§ 1981 claim was barred by his failure to assert it in prior litigation); *Antonioli v. Lehigh Coal Company*, 451 F.2d 1171 (3rd Cir. 1971).

The Petitioner also contends that because the identities of the parties in the two lawsuits are not identical, res judicata does not apply. This argument is also without merit. The interests of all Respondents in this case are identical. That is, the Respondents are the District and several of its employees and school board members. The employees and board members are merely nominal parties; the District is a real party in interest. Thus, res judicata bars the claims against all defendants. See *Slaughter v. AT&T Information Systems*, 905 F.2d 92, 94 (5th Cir. 1990).

For all of these reasons, this case meets the requirements for dismissal based on res judicata, and the trial and appellate courts appropriately dismissed the case under that defense.

B. Statute of Limitations

While the Fifth Circuit did not address this issue, the trial court correctly noted that this case was subject to dismissal based on the defense of statute of limitations. Under Texas law, limitations of most claims are governed by the two-year statute included in the Texas Civil Practice & Remedies Code. See Tex. Civ. Prac. & Rem. Code § 16.003. This statute applies to the Petitioner's state tort claims. See *Brady v. Blue Cross & Blue Shield of Texas*, 767 F. Supp. 131 (N.D. Tex. 1991); *Ali v. Higgs*, 892 F.2d 438 (5th Cir. 1990). This two-year statute also applies to most of the Petitioner's federal claims. See, e.g., *Hinson-El*

v. Rogers, 523 F.2d 51 (5th Cir. 1991). By all applicable statutes of limitation, these claims are untimely and subject to dismissal.

Also, the Petitioner's breach of contract claim is untimely. This claim is governed by a four-year statute of limitations. See Tex. Civ. Prac. & Rem. Code § 16.004. The limitations period on the Petitioner's contract claim commenced on January 19, 1989, the date of her placement on medical health leave. However, she did not file a contract claim until August of 1993 (over four and one-half years later), making her contract claim untimely. In sum, the trial court directly dismissed the second lawsuit as untimely under all applicable statute of limitations.

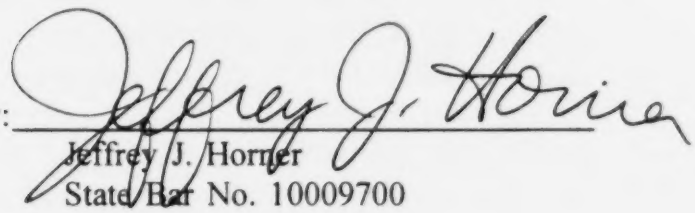
CONCLUSION

Due to the actions of the Petitioner, this case suffers from a long and tortured procedural history. The Respondents have been forced essentially to litigate the same lawsuit twice, each time from the trial court level to the United States Supreme Court. The Respondents request that this Court bring an end to the needless expenditure of money and administrative time incurred in defending this litigation.

The trial court correctly rendered summary judgment in this case, and the Fifth Circuit concurred. The record clearly demonstrates that all causes of action asserted by the Petitioner are barred by the res judicata and/or statute of limitations defenses. Furthermore, this case presents no unique, important, or unsettled questions of law which justify further consideration by this Court. Accordingly, the Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

Bracewell & Patterson, L.L.P.

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Attorneys for the
Respondents

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the Appellant, by placing a copy of same in the United States Certified Mail, Return Receipt Requested, on this 26 day of April, 1995, addressed as follows:

Ms. Marvinell Brown
5722 Tiffany
Houston, Texas 77085

Jeffrey J. Horner

CERTIFICATE OF RECEIPT

I received the Petitioner's petition for writ of certiorari on April 17, 1995 by U.S. Mail.

Jeffrey J. Horner

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